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IN THE

Supreme Court of the United States

AKOS SWIERKIEWICZ,
Petitioner,
v.
SOREMA, N.A.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

NANCY L. PERKINS*
DAVID B. BERGMAN
DAMON MONTERISI
EUGENE T. CHEN
GEOFFREY J. MICHAEL**
ARNOLD & PORTER
555 Twelfth Street, N.W.
Washington, D.C. 20004
(202) 942-5000
Counsel for Lawyers' Committee for Civil Rights Under Law
*Counsel of Record
**Admitted to the N.Y. Bar; Application Pending to D.C. Bar

JOHN A. PAYTON
GARY T. JOHNSON,
co-chairs
NORMAN REDLICH,
trustee
BARBARA R. ARNWINE
THOMAS J. HENDERSON
NEKIMA V. LEVY
LAWYERS' COMMITTEE
FOR CIVIL RIGHTS
UNDER LAW
1401 New York Ave., N.W.
Suite 400
Washington, D.C., 20005
(202) 662-8330

November 16, 2001

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INTERESTS OF *AMICUS CURIAE*

The Lawyers' Committee for Civil Rights Under Law is a tax-exempt, nonprofit civil rights legal organization founded in 1963 by the leaders of the American bar at the request of President Kennedy to provide legal representation to the victims of civil rights violations.[1] Its members include former Attorneys General, former Assistant Attorneys General for the Civil Rights Division of the Department of Justice, former Chairs of the Equal Employment Opportunity Commission, former Secretaries of Cabinet Departments, law school deans and professors, and many of the nation's leading lawyers. Over the last 38 years, the Lawyers' Committee and its local affiliates in Boston, Chicago, Denver, Los Angeles, Philadelphia, San Antonio, San Francisco, and Washington have represented members of minority groups and women in hundreds of civil rights cases.[2]

SUMMARY OF ARGUMENT

In the case below, the Second Circuit improperly applied a heightened pleading requirement to affirm dismissal of a complaint that fully satisfies the notice pleading standards set forth in the Federal Rules of Civil Procedure, as well as the standards that this Court enunciated in *Conley v. Gibson*, 355 U.S. 41 (1957). It is apparent from

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[1] This brief was not authored, in whole or in part, by any counsel for a party. No person or entity, other than the *amicus curiae*, its members, or counsel contributed monetarily to the preparation or submission of this brief.

[2] Petitioner and Respondent have consented to the filing of this brief, pursuant to Rule 37.3 of The Rules Of The Supreme Court Of The United States. Copies of the parties' letters providing such consent are submitted herewith.

the Second Circuit's decision in *Swierkiewicz* and elsewhere that courts are frequently holding to a heightened pleading standard complaints that allege discrimination or violations of civil rights.

This unwarranted departure from the standards of notice pleading in cases brought under civil rights laws works irreparable injustice against civil rights plaintiffs who at the pleading stage do not have access to the formal discovery needed to adduce evidence to support their claims. By demanding that civil rights plaintiffs include in their complaints facts demonstrating an intent to discriminate – facts which typically can be discovered only after examining evidence that is in the sole control of the defendant – the Second Circuit essentially analyzes civil rights actions at the pleading stage under a scrutiny typically reserved for summary judgment motions.

The analysis in the lower courts in this case is especially troubling because the plaintiff pled sufficient facts to survive summary judgment. The plaintiff expressly pled facts to establish the four elements of the *prima facie* discrimination case: (1) he is a member of a protected class; (2) he was otherwise qualified for the position; (3) he was discharged; and (4) circumstances surrounding the employment action give rise to an inference of discrimination. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). Further, Swierkiewicz is not an isolated decision. In other cases, too, the Second Circuit has failed to follow this Court's guidance when evaluating the factual bases of discrimination claims. The net effect of these decisions is to close the courts to civil rights plaintiffs before they have had the right to take formal discovery, and thereby to thwart the legislative intent of the civil rights laws.

I. THE HEIGHTENED PLEADING REQUIREMENT IMPOSED BY THE SECOND CIRCUIT CONTRAVENES THE FEDERAL RULES OF CIVIL PROCEDURE AND BINDING PRECEDENT OF THIS COURT

When the Federal Rules of Civil Procedure were adopted in 1938, federal court practice underwent a fundamental shift in the method of pleading. Prior to 1938, when a plaintiff filed suit, he or she was required to state the facts supporting his or her claim. With the Federal Rules, the federal courts implemented a system of notice pleading, whereby a plaintiff need only state "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). In the instant case, the Second Circuit has turned back the clock to 1937 by improperly holding the plaintiff to the heightened standard of fact pleading. Specifically, the Second Circuit dismissed the plaintiff's Complaint, holding that he did not allege facts to make a *prima facie* showing of intent to discriminate under *McDonnell Douglas v. Green*, 411 U.S. 792 (1973). By demanding that plaintiff allege facts demonstrating intent, the lower court invoked an analysis that is exclusively reserved for evaluating Motions for Summary Judgment.

As this Court explained in the context of actions brought against municipal governments, absent amendment of the Federal Rules, heightened pleading standards are only appropriate in the context of actions sounding in fraud. *See Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168-69 (1993). For all other actions, Rule 8(a)(2) merely requires a plaintiff to set out "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). As the *Leatherman* Court noted:

> [p]erhaps if Rules 8 and 9 were rewritten today, claims against municipalities under § 1983 might be subjected to the added specificity requirement of Rule 9(b). . . .In the absence of such an amendment, federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later.

Leatherman, 507 U.S. at 168-69. The same analysis applies to the civil rights actions at issue here. There is no provision of law or rule that requires a plaintiff to allege facts sufficient to withstand summary judgment in the complaint. Such a requirement would constitute a return to fact pleading, a system that was rejected 63 years ago.

If its ruling were to stand, the Second Circuit would require plaintiffs to allege facts sufficient to withstand the summary judgment evidentiary standard applicable in civil rights cases set forth by this court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). In doing so, the Second Circuit effectively closes the courtroom doors to civil rights plaintiffs because the kind of factual detail required by the court here – evidence of motive or intent – is typically available only through discovery. The Second Circuit's decision contravenes this Court's plain ruling in *Conley v. Gibson*, 355 U.S. 41 (1957), also a discrimination case, where this Court stated:

> The respondents also argue that the complaint failed to set forth specific facts to support its general allegations of discrimination and that its dismissal is therefore proper. The decisive answer to this is that the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules

> require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.

Conley, 355 U.S. at 47 (footnote omitted).

Swierkiewicz, the plaintiff in the instant case, not only meets, but exceeds the *Conley* standard. His amended complaint states four counts upon which relief could be granted, covers 49 paragraphs of legal and factual allegations, has a plain statement of the court's jurisdiction, and contains a prayer for relief. Thus, the three requirements of Rule 8(a) are more than satisfied. Swierkiewicz specifically alleges that Sorema terminated his employment on account of his national origin and age. *See* Am. Compl. ¶¶ 43, 45. Defendants are therefore on notice of plaintiff's claims and can expect to use discovery to understand the factual underpinnings of those claims. The Federal Rules require nothing more.

In holding Swierkiewicz to a higher pleading bar than that required by notice pleading, the United States Court of Appeals for the Second Circuit effectively and erroneously conflated the standard for a motion for summary judgment with that for a motion to dismiss. Furthermore, the application of a quasi-summary judgment standard at the early stage in the litigation process improperly deprived Swierkiewicz of the important opportunity to utilize discovery to uncover facts in support of his allegation that Sorema terminated him because of his national origin and/or age.

A. The Federal Rules Of Civil Procedure Explicitly Reject The Old Strictures Of Fact Pleading In Favor Of Notice Pleading.

Before the adoption of the Federal Rules of Civil Procedure (the "Federal Rules") in 1938, pleadings served to identify and resolve the merits of the claim being litigated. In order to fulfill this purpose, a complaint had to contain a statement of the facts constituting the cause of action. Richard L. Marcus, *The Revival of Fact Pleading under the Federal Rules of Civil Procedure*, 86 Colum. L. Rev. 433, 438 (1986). However, fact pleading "invited unresolvable disputes about whether certain assertions were allegations of ultimate fact (proper), mere evidence (improper), or conclusions (improper). In particular, there was great difficulty distinguishing ultimate facts from conclusions since so many concepts, like agreement, ownership and execution, contain a mixture of historical fact and legal conclusion." *Id.* at 438 (footnote omitted).

Conversely, the Federal Rules require only that a complaint contain "a short and plain statement of the claim." Fed. R. Civ. P. 8(a)(2). As this Court has stated, "the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim." *Leatherman*, 507 U.S. at 168 (*quoting Conley*, 355 U.S. at 47). Rather than providing a vehicle through which courts can determine the validity of claims, modern complaints serve the purpose of "giv[ing] the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley*, 355 U.S. at 47. The Conley Court went on to say, "[t]he Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Id.* at 48.

Official Form 9 of the Federal Rules illustrates the lenient nature of notice pleading. Form 9 provides an example of a hypothetical complaint for negligence. In that model complaint, the plaintiff merely pleads that on a certain date, at a certain place, "defendant negligently drove a motor vehicle against plaintiff." Fed. R. Civ. P. app. Form 9. The complaint in Form 9 contains no further factual allegations to support the legal conclusion that the defendant acted negligently because, under notice pleading, no such recitation of facts is necessary. "The complaint [only] ha[s] to indicate the nature of the plaintiff's claim with only enough specificity to enable the parties to determine the preclusive effect of a judgment disposing of the claim." *Am. Nurses' Assoc. v. Illinois*, 783 F.2d 716, 723 (7th Cir. 1986).

The United States Court of Appeals for the Second Circuit clearly erred in examining Swierkiewicz's complaint for a specific factual allegation that showed intent to discriminate. The court noted that Swierkiewicz's complaint contained an "allegation that his termination was motivated by . . . discrimination," yet found this to be insufficient. *Swierkiewicz v. Sorema, N.A.*, 5 Fed. Appx. 63, 64, Appendix to Petition for Writ of Certiorari ("Cert. App.") at 3a (2d Cir. 2001) (unpublished). Under notice pleading, Swierkiewicz had no obligation to plead any facts supporting the allegation that Sorema acted in a discriminatory manner, just as the hypothetical plaintiff in Form 9 had no obligation to plead any facts supporting the allegation that defendant acted in a negligent manner. *See Bennett v. Schmidt*, 153 F.3d 516, 518 (7th Cir. 1998) ("'I was turned down for a job because of my race' is all a complaint has to say" under notice pleading.). Further, the essence of proof in employment discrimination cases typically will be within the sole control of the defendant. In order to infer the intent and motive of the employer, the jury will be presented with the employer's records and other materials, obtained during discovery. It is thus even more important in these cases that

a party be afforded the chance to proceed to discovery when his or her complaint meets the basic requirements of notice pleading.

B. The Purpose Of Notice Pleading Is Reflected In The Differing Standards For Evaluating Motions To Dismiss And Motions For Summary Judgment.

Under fact pleading, the demurrer, the antecedent of the Rule 12(b)(6) motion to dismiss, was the principal tool for probing the evidentiary basis for a plaintiff's factual conclusions. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). This was proper because, under fact pleading, complaints were to have contained all the facts necessary to support the allegations. *See* 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1355 (2d ed. 1990).

Conversely, "[t]he purpose of a motion under Rule 12(b)(6) is to test the formal sufficiency of the statement of the claim for relief; it is not a procedure for resolving a contest about the facts or merits of the case." 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1356 (2d ed. 1990). The limited role of the motion to dismiss reflects a determination by the drafters of the Federal Rules that pleadings are an ineffective means to weigh the merits of a claim, particularly at the start of litigation, before all of the relevant facts are available to the parties. *See* Charles E. Clark, *The Handmaid of Justice*, 23 Wash. U. L.Q. 297, 311-17 (1938). The proper role of the motion to dismiss also reflects the general principle adopted by the Federal Rules in favor of resolution of cases on their merits. *See* Fed. R. Civ. P. 8(f) ("All pleadings shall be so construed as to do substantial justice").

II. IN IMPOSING A HEIGHTENED PLEADING STANDARD, THE COURT OF APPEALS IMPERMISSIBLY CONFLATED THE STANDARD APPLICABLE TO A MOTION TO DISMISS WITH THAT OF A MOTION FOR SUMMARY JUDGMENT

The Federal Rules provide an alternative method for the early resolution of claims on their merits — the Rule 56 motion for summary judgment. Whereas a motion to dismiss "does not challenge the actual existence of a meritorious claim," a motion for summary judgment "is on the merits." 10A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2713 (3d ed. 1998). As the United States Court of Appeals for the Seventh Circuit has noted:

> The Rules of Civil Procedure make a complaint just the starting point. Instead of lavishing attention on the complaint until the plaintiff gets it just right, a district court should keep the case moving — if the claim is unclear, by requiring a more definite statement under [Fed. R. Civ. P.] 12(e), and if the claim is clear but implausible, by inviting a motion for summary judgment.

Bennett, 153 F.3d at 518. Indeed, since the complaint now only serves to give notice to the defendant, the Federal Rules provide various mechanisms other than Rule 12(b)(6) to narrow the issues and facts of a case and dispose of frivolous claims. These other mechanisms include not only Rule 56, but also Rule 11 (requiring a reasonable inquiry), Rule 12(e) (motion for a more definite statement), Rule 16 (pretrial conferences), and Rules 26 through 37 (discovery management).

The United States Court of Appeals for the Second Circuit clearly erred by using the motion to dismiss to test

the merits of Swierkiewicz's claims. The question whether Swierkiewicz has sufficient evidence to show that he was terminated because of his national origin and/or age goes directly to the merits of his claims. Therefore, examination of that question is only appropriate under Rule 56, not Rule 12(b)(6). *See* Fed. R. Civ. P. 56 advisory committee note, 1963 amend. ("The very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial.").

A. The Use Of A Heightened Pleading Standard In Civil Rights Cases Conflates The Standards Of Motions To Dismiss And Motions For Summary Judgment.

As one commentator noted, "there often is confusion in distinguishing [between] the motion for summary judgment [and] the motion to dismiss for failure to state a claim." 10A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2713 (3d ed. 1998). The improper application of heightened pleading standards in civil rights cases has exacerbated this confusion. By wrongly applying a heightened pleading standard to civil rights cases, the lower courts misuse Rule 12(b)(6) to examine the factual and evidentiary allegations to determine if a "genuine issue of material fact" exists. But that inquiry is within the rubric of Rule 56 and is to be directed at an examination of the evidence gathered during discovery. In short, lower courts impermissibly are entering summary judgment against civil rights plaintiffs on the complaint. This practice has forced civil rights plaintiffs regularly to attach affidavits and exhibits to their briefs opposing dismissal in an attempt to make an evidentiary showing in support of their allegations before they have had an

opportunity to develop their evidence through the discovery process.[3]

The federal courts' impulse to utilize some procedural mechanism for assessing the factual validity of a civil rights claim at the pleading stage may be understandable. Many federal courts strive to reduce the burden on the courts and defendants. *See, e.g., Judge v. City of Lowell*, 160 F.3d 67, 72 & n.3 (1st Cir. 1998). Indeed, one commentator has gone so far as to suggest that many courts believe that "[t]he vast majority of civil rights actions are frivolous." Douglas A. Blaze, *Presumed Frivolous: Application of Stringent Pleading Requirements in Civil Rights Litigation*, 31 Wm. & Mary L. Rev. 935, 960 (1990). However, regardless of the reasons behind heightened pleading standards, it is improper to require claimants to provide more detailed factual allegations in the complaint than is required by the Federal Rules. As the United States Court of Appeals for the Fourth Circuit wrote:

> We realize how a harried trial judge, burdened by a heavily congested docket, will seek to expedite the disposition of cases on his overcrowded docket, but while the expeditious and efficient processing of litigation is laudable and should be encouraged, it must be remembered . . . that

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[3] In situations in which heightened pleading standards are not required by Rule 9(b), "[t]actically, the pleader is unlikely to initiate the introduction of outside material because if he does, the Rule 12(b)(6) motion, which is rarely granted on the merits, will be converted into a motion for summary judgment and may result in a binding final determination against him." 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1366 (2d ed. 1990).

> the Federal Rules provide an adequate and orderly procedure for the summary dismissal of complaints which fail to state a claim on which relief can be granted, Rule 12; and for summary judgment . . . Rule 56 . . . . Only by adherence to the spirit of these rules can we be sure of a full hearing, the essence of due process.

Gellman v. Maryland, 538 F.2d 603, 606 (4th Cir. 1976) (internal quotations and citations omitted).

Swierkiewicz alleged in his complaint all that the Federal Rules require. He provided a description of his cause of action. The allegations in the complaint sufficiently gave Sorema notice of allegations that Swierkiewicz was terminated because of his national origin and/or age. *See Walker v. S. Cent. Bell Tel. Co.*, 904 F.2d 275, 277-78 (5th Cir. 1990). The lower courts, by examining the complaint for specific facts beyond those providing notice of a discrimination claim, including Swierkiewicz' allegation of discriminatory intent, effectively applied the standard for a motion for summary judgment in the context of a motion to dismiss. Stated another way, the lower courts' application of a heightened pleading standard required Swierkiewicz to make a showing similar to that required of plaintiffs in the days of fact pleading before the adoption of the Federal Rules. *See also* Fed. R. Civ. P. 9(b) ("[I]ntent . . . may be averred generally.").

B. The Conflation Of Standards For Motions To Dismiss And Motions For Summary Judgment Disproportionately Impacts Plaintiffs In Civil Rights Cases.

The scope of discovery pursuant to Rule 26(b) of the Federal Rules extends widely to "any matter, not privileged,

that is relevant to the claim or defense of any party. . . ." Fed. R. Civ. P. 26(b)(1). The Advisory Committee Notes to the 1946 Amendment to Rule 26(b) emphasize that:

> The amendments to subdivision (b) make clear the broad scope of examination and that it may cover not only evidence for use at the trial but also inquiry into matters in themselves inadmissible as evidence but which will lead to the discovery of such evidence. *The purpose of discovery is to allow a broad search for facts, the names of witnesses, or any other matters which may aid a party in the preparation or presentation of his case.*

Fed. R. Civ. P. 26(b) advisory committee notes, 1946 amend. (emphasis added). Shortly after the Federal Rules were adopted, one court noted that "[t]o limit an examination to matters relevant to only the precise issues presented by the pleadings, would not only be contrary to the express purposes of rule 26. . . but also might result in a complete failure to afford plaintiff an adequate opportunity to obtain information that would be useful at the trial." *Stevenson v. Melady*, 1 F.R.D. 329, 330 (S.D.N.Y. 1940).

The ability to conduct substantial, thorough discovery is particularly important in civil rights and discrimination cases. In most such cases, an individual brings suit against a corporation, organizational entity, or governmental body, challenging the policies, practices, or actions of that institution. Under this Court's jurisprudence, a civil rights plaintiff must demonstrate a *prima facie* case of discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). The burden then shifts to the defendant "to articulate some legitimate, nondiscriminatory reason" for the challenged practice. *Id.* The burden then

returns to the plaintiff to demonstrate that the defendant's stated reason is pretextual. *Id.* at 803. In order to satisfy his or her burden, a civil rights plaintiff must necessarily produce evidence giving rise to an inference of the defendant's motives and justifications, and in most cases, the defendant's practices with respect to other employees and other evidence of pretext.

The federal courts have long recognized that a civil rights plaintiff's burden of production is particularly difficult in light of the imbalance in information. Evidence relating to institutional motives, justifications, and practices is almost always held exclusively by the defendant, and is often guarded even from internal disclosure. The United States Court of Appeals for the Third Circuit has commented that:

> In numerous cases the courts have recognized that an employee bringing [an employment discrimination] suit faces difficulties in amassing proof because discrimination "is often subtle." As we stated, "[d]iscrimination victims often come to the legal process without witnesses and with little direct evidence indicating the precise nature of the wrongs they have suffered."

Smith v. Borough of Wilkinsburg, 147 F.3d 272, 278 (3d Cir. 1998) (citations omitted).

The United States Court of Appeals for the Seventh Circuit has also noted that civil rights plaintiffs have an acute need to conduct discovery, stating:

> [A]ge discrimination may be subtle and even unconscious. Even an employer who knowingly discriminates on the basis of age may leave no written records revealing the forbidden motive and may communicate it orally to no one. When evidence is in existence, it is likely to be under the control of the employer, and the plaintiff may not succeed in turning it up.

Oxman v. WLS-TV, 846 F.2d 448, 453 (7th Cir. 1988) (citing *La Montagne v. American Convenience Prods., Inc.*, 750 F.2d 1405, 1410 (7th Cir. 1984)).[4]

By requiring a heightened pleading standard, whereby civil rights plaintiffs must plead their claims "with factual detail and particularity," lower courts effectively deny plaintiffs the right to discovery needed to collect information exclusively in the possession of the defendant necessary to prove his or her case. In practice, in order to survive a motion to dismiss, courts are demanding that civil rights plaintiffs produce evidence of the factual merit of the case at a point before they have had the opportunity to engage in discovery of the defendant. By judging the merits of the case on the complaint and foreclosing access to discovery, courts deprive civil rights plaintiffs of the means of identifying, gathering, assessing, and presenting evidence essential to the proof of their claims. Such a heightened pleading standard thus frustrates the spirit and the rationale of the Federal Rules of Civil Procedure and effectively closes the courts to civil rights plaintiffs.

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[4] Other Courts of Appeals across the country have acknowledged the "information imbalance" in civil rights cases as well. *See Luciano v. Olsten Corp.*, 110 F.3d 210, 215 (2d Cir. 1997); *Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061, 1071 (3d Cir. 1996) (*en banc*), *cert. denied*, 521 U.S. 1129 (1997); *Harrington v. Harris*, 118 F.3d 359, 367 (5th Cir. 1997), *cert. denied*, 522 U.S. 1016 (1997); *Kline v. Tennessee Valley Auth.*, 128 F.3d 337, 348 (6th Cir. 1997); *Rothmeier v. Inv. Advisors, Inc.*, 85 F.3d 1328, 1332 (8th Cir. 1996); *Shealy v. City of Albany*, 89 F.3d 804, 806 (11th Cir. 1996).

III. THE COURT OF APPEALS IMPERMISSIBLY REQUIRES THE PLAINTIFF TO PLEAD MORE FACTS IN HIS OR HER COMPLAINT THAN IS NECESSARY TO SURVIVE A MOTION FOR SUMMARY JUDGMENT UNDER THIS COURT'S PRECEDENTS

It is rare that a plaintiff in a discriminatory treatment case can adduce evidence that specifically demonstrates the discriminatory animus of an employer. Recognizing that employers easily could mask the true reasons for a discriminatory employment decision, this Court established an inferential model for the presentation of proof. This framework, developed in the seminal case of *McDonnell Douglas Corp. v. Green*, creates a burden shifting model to assess claims brought under Title VII and the Age Discrimination in Employment Act. Not only did the Court of Appeals impose a heightened pleading standard and erroneously apply a Summary Judgment standard, but also failed to apply this Court's precedent regarding this inferential model of proof.

The Second Circuit affirmed the dismissal of Swierkiewicz' claims because, in its view, he had failed to allege facts sufficient to establish a *prima facie* case of discrimination under the *McDonnell Douglas* framework. *See Swierkiewicz*, 5 Fed. Appx. at 64-65, Cert. App. at 3a-4a. It is undisputed that Swierkiewicz stated facts to establish the first three elements of the *prima facie* case, i.e., membership in a protected class, qualification for the job in question, and an adverse employment action. Trans. at 3, Cert. App. 6a. The *Swierkiewicz* court held that the plaintiff failed to assert facts to make out circumstances that give support to an inference of discrimination in both his national origin and age discrimination claims. *See id.* However, Swierkiewicz did in fact allege in his complaint that his supervisors were French (Swierkiewicz is not of French national origin) and

that his responsibilities were transferred to a French National who was 16 years younger than the plaintiff. Am. Compl. ¶ 19. Under this Court's precedent, these allegations are sufficient to satisfy the inference of discrimination element of the *prima facie* case. *McDonnell Douglas*, 411 U.S. at 802. Additionally, Swierkiewicz alleged that his supervisors had made comments – that they were seeking to "energize" the underwriting department – from which a finder of fact could infer discriminatory intent. Am. Compl. ¶ 23, Cert. App. 2a, 4a. Thus, Swierkiewicz pled more facts than would be required to defeat a motion for summary judgment, facts that would permit the trier of fact to infer discriminatory intent.

As decisions of this court make clear, most recently in *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000), the federal court's role in discrimination cases is to make only an initial determination as to whether a question of fact exists for a jury to decide. However, the Court has overstepped the limits of this narrow gatekeeping authority under the guise of Motions for Summary Judgment under Federal Rule of Civil Procedure 56 and Motions for Judgment as a Matter of Law under Rule 50, often evaluating and weighing evidence in ways specifically and expressly reserved to juries. Thus, the Court's improper application of the summary judgment standard on a 12(b)(6) motion was further complicated by the application of an erroneous summary judgment standard.

A. The *McDonnell Douglas* Evidentiary Framework Does Not Grant Courts The Power To Usurp The Role Of The Jury As Finder of Fact; Indeed, It Expressly Reserves Factual Determinations For The Jury.

To proceed in a civil rights case under the inferential model, a plaintiff's claim must establish the four elements of the *prima facie* case, that: (1) he or she is a member of a protected class; (2) he or she was otherwise qualified for the position; (3) he or she was discharged or suffered other adverse employment action attributable to the employer; and (4) circumstances surrounding the employment action give rise to an inference of discrimination. *See Reeves*, 530 U.S. at 142; *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *Baralt v. Nationwide Mut. Ins. Co.*, 251 F.3d 10, 16 n.8 (1st Cir. 2001). If the *prima facie* standard is met, the burden shifts to the defendant to demonstrate that the employment action was taken for a legitimate, nondiscriminatory reason. *See Reeves*, 530 U.S. at 142. This burden is one of production rather than persuasion — it involves no assessment of the credibility of the evidence. *See id.* at 142-43 (quoting *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 509 (1993)). If the defendant meets this burden, the *McDonnell Douglas* framework disappears and the sole remaining issue is whether the employer's actions were discriminatory. *See Reeves*, 530 U.S. at 143.

Despite the shifting evidentiary burdens, the ultimate burden of persuasion remains with the plaintiff. *See id.* As this Court stated in Reeves, "the plaintiff may attempt to establish that he was the victim of intentional discrimination 'by showing that the employer's proffered explanation is unworthy of credence.'" *Id.* (quoting *Texas Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256 (1981)). Further, although the presumption of discrimination created by

meeting the *prima facie* case is eliminated when the defendant meets its burden of production, the jury may still consider the evidence used to establish the *prima facie* case in determining whether the explanation offered by the defendant is pretextual. *See id.* (citing *Burdine*, 450 U.S. at 255 n.10).

B. This Court's Decision In *Reeves* Creates A Very Specific And Circumscribed Role For The Trial Court In Discrimination Cases.

There is no doubt that judicial review of discrimination cases under Rule 50 and Rule 56, at the appropriate stage of proceedings, is an important element of the remedial framework of civil rights cases. Because discrimination is very rarely open and notorious, it seldom is provable by direct evidence; employers who discriminate often do not note in an employee's personnel file that he or she was fired because he or she was too old or because he or she was German or because he or she was black. The *McDonnell Douglas* framework attempts to solve this evidentiary conundrum by allowing juries to infer discrimination from indirect evidence. Lower courts, however, have taken an increasingly active role in evaluating evidence before allowing cases to proceed to trial (Rule 56) and in reviewing jury verdicts (Rule 50). In their vigilance, lower courts have increasingly overstepped their authority in granting judgments for the employer-defendants, despite this Court's admonition last year in *Reeves*, an error the Second Circuit compounded by conflating this erroneous standard with the standard under Rule 12(b)(6).

This Court set out in *Reeves* the standard for the use of summary judgment and judgment as a matter of law in civil rights cases. Reeves, a supervisor in Sanderson Plumbing Products' Hinge Room, brought an action for age discrimination under the Age Discrimination in Employment

Act (ADEA). Reeves offered evidence at trial that supported the *prima facie* requirements of the *McDonnell Douglas* framework. *See Reeves*, 530 U.S. at 142. Defendant, in turn, introduced evidence of a legitimate, nondiscriminatory justification for Reeves' termination, namely that Reeves had committed numerous timekeeping errors and misrepresentations in recording the attendance and hours of those employees under his supervision. *See id.* at 137-38. Reeves then introduced evidence that he had accurately recorded the hours and attendance of the employees he supervised, and that one of the supervisors who recommended Reeves' termination, "had demonstrated age-based animus in his dealings with petitioner." *See id.* at 138. Based on this evidence, the jury returned a verdict in favor of Reeves. *See id.* at 139. The district court denied the defendant's motion for judgment as a matter of law. *See id.*

The Court of Appeals for the Fifth Circuit reversed, holding that Reeves had not introduced evidence sufficient to support the jury's finding of unlawful discrimination. *See id.* The Court of Appeals held that while Reeves may have introduced sufficient evidence for a "reasonable jury [to] have found that [respondent's] explanation for its employment decision was pretextual," this was not dispositive of the ultimate question of whether Reeves introduced sufficient evidence that his age motivated the decision to terminate his employment. *See id.* (quoting *Sanderson Plumbing Prods., Inc. v. Reeves*, 197 F.3d 688, 693 (5th Cir. 1999)). The Court of Appeals then answered this question in the negative after weighing Reeves' additional evidence of discrimination against other circumstances surrounding his discharge. *See id.*

This Court then reversed the Court of Appeals, holding that the evidence supporting plaintiff's *prima facie* case *plus* evidence that the defendant's asserted reasons were pretextual may support a finding of discrimination by the

ultimate finder of fact. *See id.* at 146-47. Justice O'Connor, writing for a unanimous court, wrote:

> [p]roof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive. . . . Moreover, once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision.

Id. at 147.[5]

The Court went on to distinguish between the role of district courts in evaluating evidence under Rules 50 and 56 and the role of the jury as ultimate trier of fact. The Court emphasized the well established principle that courts are to examine the record as a whole, drawing all inferences in favor of the non-moving party. *See id.* at 149-50. Moreover, the Court cautioned that:

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[5] The Court cautioned that a showing that defendant's reasons for taking action were pretextual may not be adequate to sustain a jury's verdict in all circumstances, such as where the record revealed other, nondiscriminatory reasons for the discharge or where there was only a weak issue of fact as to the pretextual nature of the employer's reason and there was uncontroverted independent evidence that no discrimination had occurred. *See Reeves*, 530 U.S. at 148. Whether to grant judgment as a matter of law in a specific case will depend on numerous factors, but this Court held that the Court of Appeals in *Reeves* was incorrect to insist that a plaintiff must *always* introduce additional evidence, separate from that used to establish the *prima facie* case and from that used to show that the proffered justifications were pretextual. *Id.* at 149.

> the court . . . may not make credibility determinations or weigh the evidence. . . . Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge. Thus, although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe. That is, the court should give credence to the evidence favoring the nonmovant as well as that evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses.

Id. (internal quotations and citations omitted.). *Accord St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993) (holding that establishing elements of inferential model and adducing evidence that the defendant's proffered reasons were false creates a fact question only to be resolved by the jury).

Reeves clearly confirms that only the jury may decide factual issues such as the credibility of witnesses and the inferences to be drawn from a party's actions or words. These cases reinforce the strict limits on the District Court's authority to weigh the evidence in discrimination cases. Once a plaintiff establishes the *prima facie* case and adduces evidence that the defendant's asserted justifications for its actions are false, a question of fact for the jury almost always exists.

C. The Plaintiff's Allegations In The Instant Case Are Sufficient To Defeat A Motion For Judgment As A Matter Of Law.

The allegations in *Swierkiwicz*, if they are supported by evidence adduced during discovery and at trial, would support a verdict for the plaintiff and would thus survive a motion for summary judgment pursuant to Rule 56. The district court acknowledged that the plaintiff had pled three of the four elements of the *prima facie* case. *See Trans.* at 3, Cert App. at 6a. The court held, however, that the circumstances of the adverse action were insufficient to support an inference of discrimination. *See id.* In so holding, the court ignored the fact that Swierkiewicz was replaced by a man of French national origin who was 32 years old and improperly weighed the import of the statement by Mr. Papadopoulo that Mr. Chavel wanted to "energize" the underwriting department. The court held the remark was too vague to be age-related, was too remote in time, unrelated to the job action at issue, and cannot be said to be directed at plaintiff or his work activities. *See id.* at 6, Cert. App. at 8a. This evaluation of the allegations by the court, especially at this early stage of the litigation, is exactly the invasion of the province of the jury that this Court prohibited in *Reeves*. Swierkiewicz has alleged that the "energize" comment is indicative of the age-based motivations of his employer. The probative value of such a comment is for the jury to decide. Its context and the surrounding discussion could suggest discrimination – as Swierkiewicz alleges – or they could show something innocuous and not actionable. The context of the remark may make all the difference and without discovery the complete context cannot be known. Whatever meaning is ultimately attributed to the comment, the plaintiff is entitled to its most favorable interpretation under Rules 50 and 56. It is completely inappropriate for the court to evaluate the probative value of a remark as a matter of law at the 12(b)(6) stage of the litigation, especially a remark

whose circumstances could well suggest the discriminatory motive of a goal to hire younger people at the expense of the plaintiff.

D. The District Courts And Courts Of Appeal Have Repeatedly Misapplied The *Reeves* Standard For Judgment As A Matter Of Law.

In the seventeen months since *Reeves* was decided the Court of Appeals has misinterpreted or ignored the plain commands handed down in a unanimous opinion of this Court. This is demonstrated by the case at bar and the following sample of relevant Second Circuit decisions.

1. *James v. New York Racing Assoc.*, 233 F.3d 149 (2d Cir. 2000)

James was hired by the New York Racing Association (NYRA) in 1989 as Assistant Security Director. *See James*, 233 F.3d at 151. In approximately 1994, NYRA. began a program of reorganizing and downsizing. In October 1996, NYRA discharged James, who was then 59, listing "downsizing" as the reason in his personnel file, and hiring a 42 year old to take over most of his responsibilities. *See id.* at 152. James claimed that downsizing was a pretextual reason for his termination, contending that because of a promotion and a new hire, there was no net downsizing. *See id.* James also pointed to remarks made by senior NYRA managers expressing hope that they could "save NYRA for the younger guys" and that there were "too many older supervisors and some of them needed to retire." *Id.*

The Second Circuit Court of Appeals affirmed the District Court's grant of summary judgment to the defendant, holding that the evidence, "taken as a whole, cannot reasonably support an inference that James's discharge was

motivated by age-based animus." *Id.* The court stated that there was "overwhelming" evidence that NYRA was engaged in a bona fide reduction in force in attempts to save operating costs to avoid bankruptcy. *Id.* The court also attributed the remarks that older employees needed to retire to a desire to reduce the higher costs of older, more senior employees. *See id.*

The Court of Appeals thus engaged in exactly the weighing of evidence and the assessment of its credibility that this Court expressly forbade in *Reeves*. Weighing the proffered reasons and assessing their credibility are exactly the types of questions reserved for the finder of fact. The court made no citation to the record to support its own invented explanation that the remarks about saving NYRA for younger employees was related to the higher costs of keeping senior employees. There was no indication that any evidence was put forth by NYRA that such a meaning could be attributed to these remarks.

The court attempted to harmonize its holding with *Reeves* by explaining that, in its view, all *Reeves* did was confirm the view that Rules 50 and 56 mandate a case-by-case analysis of the evidence before submission to the trier of fact. To be sure, *Reeves* does contemplate a very limited role for the court in assessing these claims before they are sent to the jury. However, the Second Circuit's expansive reading of *Reeves* entirely undermines the Court's holding. This Court specifically cautioned that the courts "may not make credibility determinations or weigh the evidence." *Reeves*, 530 U.S. at 150. It is difficult to see the *James* court as engaging in anything other than "credibility determinations" and "weigh[ing] the evidence."

2. *Schnabel v. Abramson*, 232 F.3d 83 (2d Cir. 2000)

Schnabel was discharged from the Legal Aid Society of Orange County, New York, in 1997 after just over 3 years employment. *Schnabel*, 232 F.3d at 85-86. Schnabel claimed that his discharge was due to unlawful discrimination in violation of the ADEA. *See id.* On Defendants' Motion for Summary Judgment, the trial court dismissed Schnabel's action. The Second Circuit affirmed, holding that although Schnabel met the *prima facie* case and offered evidence to show that the defendants' asserted reasons for the discharge were pretextual, Schnabel "presented no evidence upon which a reasonable trier of fact could base the conclusion that age was a determinative factor in defendants' decision to fire him." *See id.* at 91. The court examined all of the evidence presented by the parties in reaching its decision, noting of particular import that the same person who made the decision to hire Schnabel also made the decision to fire him, and that the person who replaced Schnabel was the same person Schnabel was hired to replace. *See id.* According to the court, this illustrated how the decision to fire Schnabel was not made in a vacuum. *See id.*

These pieces of evidence, when taken as a whole, led the court to find that as a matter of law no reasonable jury could find that Schnabel was discharged because of his age. *See id.* What the Second Circuit did, once again, is to act as a pre-trial jury and weigh the evidence and its probative value in establishing plaintiff's claim. Once the court found that the *prima facie* elements were met and that evidence of pretext had been introduced, it should only have granted judgment as a matter of law if there was undisputed evidence of a different nondiscriminatory motive or if there was "only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted

independent evidence that no discrimination had occurred." *Reeves*, 530 U.S. at 148. This strict standard from *Reeves* bars the trial court from weighing specific pieces of evidence against each other and making an overall assessment of the evidence, which is precisely what the lower court in Schnabel did.[6]

These two decisions, issued at the summary judgment stage, are illustrative of the Second Circuit's departure from this Court's ruling last year in *Reeves*. In the case at bar, however, the problem is exacerbated by the Circuit's imposition of the summary judgment standard at the 12(b)(6) stage – by first imposing a heightened pleading standard and then evaluating the facts pled in the Complaint as if the facts were evidence adduced during discovery.

IV. CONCLUSION

The federal courts disavowed the archaic system of fact pleading in 1938. No longer are federal court plaintiffs required to assert the factual basis for the claims in their complaints except in the narrow category of actions sounding in fraud. The Second Circuit has attempted to add

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[6] For examples of other Courts of Appeals improperly evaluating the evidence on summary judgment, see *Malacara v. City of Madison*, 224 F.3d 727 (7th Cir. 2000) and *Williams v. Raytheon Co.*, 220 F.3d 16 (1st Cir. 2000). The majority evaluated the work history and experience of Malacara in affirming the grant of summary judgment to the defendants. *See Malacara*, 224 F.3d at 730. The dissent argued that the majority improperly accepted the defendant's version of the facts, *id. at 731*, and noted, "[r]arely have I seen a set of facts so clearly pointing to the need for resolution before a trier of fact." *Id.* at 735. In *Williams*, the First Circuit weighed the probative value of a supervisor's remarks about changing Raytheon's "old, white men" culture against the probative value of Raytheon's stated reason for the discharge in finding that there existed no question of fact for a jury to decide. *Williams*, 220 F.3d at 19-20.

employment discrimination cases to this narrow category by affirming the dismissal of Swierkiewicz' claim for failing to allege facts in his complaint to satisfy its erroneous view of the summary judgment evidentiary standard set forth in *Reeves*. Application of a heightened pleading standard to civil rights complaints is not only contrary to the Federal Rules and Supreme Court precedent, but it is also especially pernicious. Given their acute need for formal discovery, a heightened pleading requirement could effectively bar civil rights plaintiffs from court. The Second Circuit's decision in *Swierkiewicz* is contrary to settled law and must be reversed.

Respectfully submitted,

NANCY L. PERKINS*
DAVID B. BERGMAN
DAMON MONTERISI
EUGENE T. CHEN
GEOFFREY J. MICHAEL**

ARNOLD & PORTER
555 12th Street N.W.
Washington, D.C. 20004
(202) 942-5000
Counsel for Lawyers' Committee For Civil Rights Under Law

*Counsel of Record
**Admitted to the N.Y. Bar., Application Pending to the D.C. Bar

JOHN A. PAYTON
GARY T. JOHNSON,
co-chairs
NORMAN REDLICH,
trustee
BARBARA R. ARNWINE
THOMAS J. HENDERSON
NEKIMA V. LEVY

LAWYERS' COMMITTEE
FOR CIVIL RIGHTS
UNDER LAW
1401 New York Ave., N.W.
Suite 400
Washington, D.C., 20005
(202) 662-8600

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